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In the Supreme Court of the United States

OCTOBER TERM, 1994

CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS AND VICINITY, ET AL., PETITIONERS

v.

DILLARD DEPARTMENT STORES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Section 5(a)(1)(A) of the Worker Adjustment and Retraining Notification Act provides that an employer who orders a plant closing or mass layoff in violation of the Act's 60-day notification requirement, 29 U.S.C. 2102, "shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for * * * back pay for each day of violation." 29 U.S.C. 2104(a)(1)(A). The question presented is whether this provision entitles aggrieved employees to damages for each calendar day of the violation, or only for each work day on which the employees would have earned wages if no violation of the Act had occurred.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. 2101 *et seq.*, prohibits covered employers, with exceptions not relevant here, from ordering "a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice" of such action to each representative of affected employees, or, in the absence of such a representative, to each employee. 29 U.S.C. 2102(a)(1). The employer is also required to provide

notice to designated state and local officials. 29 U.S.C. 2102(a)(2). Section 2(a) of the Act identifies those plant closings or mass layoffs for which an employer must give notice according to the number of employees affected, 29 U.S.C. 2101(a)(2) and (3), and defines such employees as those who "may reasonably be expected to experience" an "employment loss," including termination, a layoff longer than six months, or a greater than 50 percent reduction in work hours for each of six months, 29 U.S.C. 2101(a)(5) and (6).

Section 5(a)(1)(A) of the Act provides that an employer who violates the statutory notice requirement "shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for * * * back pay for each day of violation." 29 U.S.C. 2104(a)(1)(A). That provision also specifies the "rate of compensation" by which back pay is to be measured as no less than the higher of the employee's "average regular rate * * * during the last 3 years of * * * employment," 29 U.S.C. 2104(a)(1)(A)(i), or the employee's "final regular rate," 29 U.S.C. 2104(a)(1)(A)(ii). Statutory liability extends for a maximum of 60 days, but no more than one-half the number of days for which the aggrieved employee was employed. 29 U.S.C. 2104(a)(1). Section 5(a)(2) provides that a noncomplying employer's liability to an aggrieved employee may be reduced by "wages paid by the employer to the employee for the period of the violation," and by "any voluntary and unconditional payment" from the employer to the employee that does not result from "any legal obligation." 29 U.S.C. 2104(a)(2)(A) and (B).[1] The WARN Act does not provide,

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[1] In addition, Section 5(a)(1)(B) makes the employer liable to each aggrieved employee for "benefits under an employee benefit plan" that the employee would have received "if the employment

however, for a reduction in damages for wages earned during the violation period from another employer.[2]

2. On May 9, 1989, respondent D.H. Holmes Co., Ltd., which was in poor financial condition, became a wholly owned subsidiary of respondent Dillard Department Stores, Inc., by means of a merger. Pet. 4; Pet. App. A2-A4, A42. That merger resulted in the layoff of approximately 800 Holmes employees between May and August 1989. Pet. 5; Pet. App. A43-A44. Approximately 700 of those employees received less than 60 days' notice of their impending layoff. Pet. 5. Recognizing that it had failed to give sufficient notice under the WARN Act, Dillard purported to comply voluntarily with the Act's damages provision by identifying those employees it believed to be covered by the Act, and paying them for the days they would have worked had it given sufficient notice, minus any outstanding severance or vacation pay. *Ibid.*; Pet. App. A4-A5, A44.

3. Petitioners, a class of former employees who were terminated as a result of the merger and who did not receive the requisite notice, filed suit in federal district court against respondents, several of respondents' individual officers and directors, and their fiduciary liability insurer. Pet. App. A5-A6, A41, A70. On petitioners' motion for partial summary judgment, the magistrate judge determined that respondents' failure to

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loss had not occurred." 29 U.S.C. 2104(a)(1)(B). Correspondingly, Section 5(a)(2)(C) permits a reduction in the amount owed for any payment made by the employer to a third party or trustee "on behalf of and attributable to the employee" for the violation period. 29 U.S.C. 2104(a)(2)(C).

[2] Section 5(a)(3) of the Act also provides for "a civil penalty of not more than $500 for each day of * * * violation" against any employer who fails to give the requisite notice to a unit of local government. 29 U.S.C. 2104(a)(3).

provide the requisite notice violated the Act, as neither of the two statutory exemptions to the Act's notice requirement, see 29 U.S.C. 2103, was applicable. Pet. App. A59. The court concluded that Section 5(a)(1) provides "a penalty for fail[ure] to give adequate notice," *id.* at A61, and that Congress had expressed a "clear" intent under that provision to provide damages for every calendar day within the violation period, *id.* at A63. After a separate trial, see *id.* at A44, the court awarded petitioners $1,262,050.10 in damages, together with pre-judgment interest and attorneys' fees. Pet. 6; Pet. App. A89, A90.

4. The court of appeals reversed in relevant part, holding that Section 5(a)(1) entitles aggrieved employees to damages only for lost work days within the statutory violation period. It acknowledged that the Act is "susceptible to more than one reasonable interpretation," and that its decision conflicts with the Third Circuit's contrary holding in *United Steelworkers* v. *North Star Steel Co.*, 5 F.3d 39 (1993), cert. denied, 114 S. Ct. 1060 (1994), that Section 5(a)(1) requires payment for every calendar day within the violation period. Pet. App. A16. The court of appeals, however, placed substantial reliance on decisional law holding that "the term 'back pay' commonly means *pay* * * * that an employee would have earned * * * if the event that affected such job related compensation had not occurred." *Id.* at A16-A17 (citing *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941)). The court observed that "[i]f aggrieved employees are paid only for days they ordinarily would have worked during the sixty-day notice period, then those employees are placed in the position they would have occupied had the violation never occurred." *Id.* at A17.

In the Fifth Circuit's view, the legislative history also showed that back pay under the Act "connote[s] the traditional back pay remedy as discussed in *Phelps Dodge*." Pet. App. A19. The court relied for this conclusion on the Senate Report accompanying a predecessor version of the Act, which stated that "damages are to be measured by the wages * * * the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period." *Id.* at A20 (quoting S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987)).

DISCUSSION

The decision of the court of appeals is erroneous and conflicts directly with the Third Circuit's resolution of the same question. Uniform application of the WARN Act is important if the Act is to fulfill its prophylactic purpose. The petition for a writ of certiorari should therefore be granted.

1. The court of appeals in this case primarily relied on its perception that "the term 'back pay' commonly means *pay*, *i.e.*, wages, benefits, etc., that an employee would have earned, or to which she would have otherwise been entitled, if the event that affected such job related compensation had not occurred." Pet. App. A16. We acknowledge that the term "back pay," as used in other statutes, typically connotes a remedy based on the wages that an employee would have earned if no violation of law had occurred. See, *e.g.*, *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197-198 (1941) (National Labor Relations Act); *United States* v. *Burke*, 112 S. Ct. 1867, 1873-1874 (1992) (Title VII). In our view, however, three features of the statutory scheme at issue here indicate that a WARN Act damage award was intended to serve significant noncompensatory purposes, and that the

award should be calculated for each calendar day of the violation.

a. The Act provides that an aggrieved employee is entitled to back pay for "each day of violation." 29 U.S.C. 2104(a)(1)(A). Read in the context of the Act as a whole, it is clear that "each day" can only mean "each calendar day," not "each work day." The Act operates according to calendar days, and makes no reference at all to work days. Thus, the employer is forbidden to "order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order," 29 U.S.C. 2102(a), and it is undisputed that this provision entitles employees to notice 60 calendar days prior to the plant closing or layoff, without regard to the employees' (potentially varying) work schedules within that 60-day period.[3] Moreover, the concluding sentence of 29 U.S.C. 2104(a)(1), which follows the specification of the manner in which compensation for "each day of violation" is to be calculated, states that the employer's liability shall be calculated "for the period of the violation," up to a maximum of 60 days, but in no event more than one-half the number of days for which the employee was employed by the employer.[4] Thus, under the Act, the term "period of the violation" identifies the time frame for which the employer is liable. The amount of compensation, however, is calculated for "each day" of that period at the specified "rate of compensation."

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[3] Indeed, a requirement that notice be given 60 work days prior to a plant closing or mass layoff would substantially expand the employer's obligations under the Act.

[4] Compare also 29 U.S.C. 2104(a)(2)(A) and (C) and the final sentence of 29 U.S.C. 2104(a)(2) (providing for the offset of wages and for health and pension contributions attributable to "the period of the violation").

The Act also provides for a civil penalty, payable to an affected "unit of local government," in an amount not to exceed "$500 for each day of such violation." 29 U.S.C. 2104(a)(3). Respondents acknowledge (Br. in Opp. 10) that, "[v]ery clearly, Congress meant for an employer to be subject to a $500 a day penalty, regardless of whether employees worked on those days or not." It is unlikely that the term "each day" was intended to have different meanings and consequences in Sections 2104(a)(1)(A) and 2104(a)(3).[5] See, *e.g.*, *Commissioner* v. *Keystone Consol. Indus., Inc.*, 113 S. Ct. 2006, 2011 (1993) ("It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the

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[5] The Conference Report states that "if the employer provides 20 days notice, then the maximum violation period for purposes of calculating back pay awards or civil fines would be 40 days. ('Violation period' refers to the period of time after a shutdown or layoff in violation of this Act, and extends for the number of days that notice was required but not given.)." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052 (1988). That passage makes clear that (1) back pay and civil fines are to be awarded for the same number of days, and (2) that number is to be determined by subtracting from 60 the number of days for which notice was given.

The Conference Report initially accompanied H.R. 3, 100th Cong., 1st Sess. (1987), which included plant-closing provisions. H.R. 3 passed the Congress in 1988 but was vetoed by President Reagan. The plant-closing provisions were subsequently passed separately in the WARN Act, Pub. L. No. 100-379, 102 Stat. 890 (1988). Because the WARN Act is "identical to the plant closing provision" included in H.R. 3, see 134 Cong. Rec. 14,983 (1988) (Sen. Metzenbaum), the legislative history of H.R. 3's plant-closing provisions should be treated as the legislative history of the WARN Act. See also Omnibus Trade and Competitiveness Act of 1988 (OTCA), Pub. L. No. 100-418, § 2, 102 Stat. 1119 (providing that the legislative history of H.R. 3, including the Conference Report, should be treated as the legislative history of the OTCA).

same meaning.") (citations and internal quotation marks omitted). The court of appeals therefore was mistaken in concluding that application of the Act's back pay provision "requires a calculation using the number of work days in the violation period rather than the number of calendar days." Pet. App. A20.

b. The Act provides that the amount of back pay for which a noncomplying employer is liable shall be reduced by "any wages paid by the employer to the employee for the period of the violation." 29 U.S.C. 2104(a)(2)(A). The Conference Report states explicitly what is implicit in that statutory text: "[T]he only payments that may offset the back pay remedy are those made by the violating employer. Wages received from another employer, or unemployment compensation payments received from the State, may not be used to offset the remedy." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1053 (1988).

In order to ensure that a backpay award places an aggrieved employee in the same position he would have occupied but for the employer's unlawful action, computation of the award ordinarily entails an offset for wages earned from another employer. See, *e.g.*, *Phelps Dodge*, 313 U.S. at 197-198;[6] 5 U.S.C. 5596(b)(1)(A)(i) (federal employee aggrieved by unjustified personnel action is entitled to receive "an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have

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[6] Indeed, in *Phelps Dodge* the Court held that the National Labor Relations Board had erred in deducting only those sums actually earned from other employers, and in failing to deduct additional sums that the employee might have earned through reasonable diligence. 313 U.S. at 197-198. The Court explained that, "[s]ince only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred." *Id.* at 198.

earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period"). The court of appeals recognized that the WARN Act's back pay provision diverges in this significant respect from the method by which back pay is ordinarily computed, see Pet. App. A18-A19 n.14, but in our view the court failed to draw the appropriate inference from that divergence. The absence of an offset for wages earned from another employer demonstrates that a WARN Act damage award is intended to serve substantial noncompensatory purposes—that Congress's intent to deter and punish violations of the Act (and to ensure that employees have the security of continuing their existing employment for each day of the 60-day notice period) has been given precedence over any desire to ensure that aggrieved employees receive only the same earnings that they would have received had no violation occurred.

c. The legislative history also shows that Congress's purpose went beyond the compensation of affected workers for earnings lost as a result of premature plant closings. An amendment introduced by Senator Quayle would have permitted employers to comply with the Act by giving "severance pay in lieu of notice." 134 Cong. Rec. 15,926 (1988).[7] In opposing the amendment, Senator Metzenbaum—the Act's principal sponsor—empha-

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[7] Even the Quayle amendment would have provided that the severance pay would be in "an amount equal to the employee's compensation as computed under section [5(a)(1)] multiplied by the number of days that the requisite notice was not given," 134 Cong. Rec. 15,926 (1988)—a formulation that would have made back pay under the Act awardable for each calendar day of the violation, whether or not an aggrieved employee would have worked and earned wages.

sized that "the bill is about giving notice. It is not a mandatory severance bill." *Id.* at 15,928. Senator Metzenbaum noted that, "[a]s stated by the National Academy of Sciences, * * * it is the notice that is essential to successful worker adjustment programs. It is the notice that gives the employee the chance to make other arrangements." *Ibid.* Senator Metzenbaum made clear, moreover, that payment of the wages that an employee would have earned absent the violation would not be an adequate substitute. Quoting from the report of a task force headed by Secretary of Labor Brock, the Senator explained that "[a]dvance notice is essential because notice facilitates greater participation and because a functioning plant is perhaps the [job retraining] program's single most important resource." *Ibid.* Congress's rejection of the Quayle amendment signaled its agreement that the WARN Act was intended, first and foremost, to induce employers to provide the notice that would enable workers to obtain job counseling and retraining at a time when the plant was still operational. An award of damages for each calendar day of the violation better effectuates that prophylactic purpose than does the approach adopted by the Fifth Circuit in the instant case.

2. The court of appeals also expressed the view that its reading of the Act was supported by (a) the anomalous results that it believed would be produced by a contrary interpretation, and (b) the Senate Report accompanying a predecessor version of the Act. The court of appeals' reliance on those considerations was misplaced.

a. Under the WARN Act, back pay is to be assessed at a rate not less than the higher of "the average regular rate received by [the] employee during the last 3 years of the employee's employment" or "the final regular rate received by [the] employee." 29 U.S.C. 2104(a)(1)(A)(i)

and (ii). The term "regular rate" derives from the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, and the compensation scheme embodied in subsections (i) and (ii) of Section 5(a)(1)(A) of the WARN Act comes verbatim from Section 7(*o*)(4) of the FLSA, 29 U.S.C. 207(*o*)(4). See Pet. 19.[8] Under the FLSA, an employee's "regular rate" is used to determine the minimum amount of overtime pay to which the employee is entitled for work in excess of 40 hours in a work week. See 29 U.S.C. 207(a). That rate includes all amounts paid to the employee, 29 U.S.C. 207(e), and is an "hourly rate" computed "by dividing [the employee's] total remuneration for employment * * * in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid," 29 C.F.R. 778.109.

Although the WARN Act specifies the manner in which an employee's hourly rate is to be determined, it does not state the number of hours for which an

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[8] Although the WARN Act does not authorize the Secretary of Labor to institute enforcement actions, it directs the Secretary to "prescribe such regulations as may be necessary to carry out" the Act, including, "at a minimum, * * * interpretative regulations" concerning satisfactory service of notice. 29 U.S.C. 2107(a). Pursuant to that authority, the Secretary has promulgated regulations at 20 C.F.R. Pt. 639. When promulgating those regulations, the Secretary expressed his intent to "rely on the definitions found in the FLSA." 54 Fed. Reg. 16,049 (1989). Those regulations do not address the calculation of damages under the WARN Act. Nevertheless, the position of the Secretary set forth in this brief regarding the proper interpretation of the phrase "back pay for each day of violation" is entitled to substantial deference. Cf. *Gardebring* v. *Jenkins*, 485 U.S. 415, 429-430 (1988) (agency's interpretation of its own regulation is entitled to deference even when that interpretation had not been asserted prior to the lawsuit in question).

employee should be credited in computing his damages for a given day. The court of appeals assumed that if the Act were read to entitle aggrieved employees to back pay for every calendar day of the violation, a worker's award for each day would be based upon the number of hours in that employee's regular shift. See Pet. App. A20-A22. The court was concerned that that method of calculation would produce anomalous and unfair results, because an employee who had worked a ten-hour shift one day per week would receive a higher WARN Act award than would an employee who had worked five eight-hour shifts per week. *Ibid.*[9]

The court of appeals erred, however, in assuming that, under a "calendar day" approach, a part-time employee's back pay award would be computed by reference to the number of hours in his typical shift. Rather, equitable treatment of full- and part-time workers is ensured by averaging each employee's weekly hours over the typical five-day work week. Thus, a part-time employee who worked a ten-hour shift one day per week would receive daily damages at his or her hourly "regular" rate for two hours of work per day, while a full-time employee would receive daily damages at his or her hourly "regular" rate for eight hours of work per day. The amount owed to such employees would then be calculated by multiplying the daily damages by the number of calendar days in the violation period (minus any statutory reductions). Under that formulation, a part-time employee is entitled to daily damages proportionally lower than those to

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[9] The Third Circuit in *United Steelworkers* v. *North Star Steel Co.*, 5 F.3d 39 (1993), cert. denied, 114 S. Ct. 1060 (1994), referred to the same hypothetical scenario but declined to determine how those employees' WARN Act awards would be computed. See 5 F.3d at 43 & nn.6-7.

which a full-time employee is entitled, and all full-time (*i.e.*, 40-hour-per-week) employees are treated equivalently regardless of their work schedules. Compare Pet. App. A21-A22 & n.16. Indeed, it appears that this method of computing damage awards was employed in the instant case. See Pet. 20. The court of appeals' limitation of damages to days on which a particular employee would have worked is therefore unnecessary to prevent anomalous and inequitable treatment of employees who have different work schedules.

b. The court of appeals also placed substantial reliance (see Pet. App. A19-A20) on the Senate Report accompanying a predecessor version of the Act.[10] That report stated:

> For violations of the notice provisions, damages are to be measured by the wages and fringe benefits (including reimbursement for medical expenses) the employee would have received had the plant remained open or the layoff been deferred until the conclusion[] of the notice period, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provision[], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987).

Although the first sentence of this passage, standing alone, lends support to the conclusion of the court of appeals, the court failed to recognize that other, more

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[10] That version included the "back pay for each day of violation" and "regular rate" formulations, but its treatment of fringe benefits differed somewhat from the statute as later enacted. See S. Rep. No. 62, 100th Cong., 1st Sess. 68 (1987).

contemporaneous, aspects of the legislative history point in the opposite direction. The Conference Report, for example, "clarif[ied] that for each day of violation, an employer is liable to each aggrieved employee for the amount paid in wages and benefits to such employee prior to the layoff, as set forth in section [5(a)(1)]." H.R. Conf. Rep. No. 576, *supra*, at 1052.[11] As one of the Act's co-sponsors stated, "[r]emedies for violation are limited to money damages—the equivalent of a day's wages and fringe benefits for each day of violation for each affected employee." 134 Cong. Rec. 15,516 (1988) (Sen. Kennedy); see also *id.* at 17,867 (Rep. McCrery) (employer's liability for "a day's wages for every day of notification not given" not relieved by fulfillment of contractual obligations); *id.* at 16,028 (Sen. Hatch).[12] As discussed above (see pages 9-10, *supra*), moreover, the Act's principal sponsor emphasized that severance payments would not be an acceptable substitute for the notice

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[11] The Conference Report also uses identical language in describing the employer's liability for back pay and for the civil penalty owed to the local government (which concededly is owed for each calendar day of the violation, see page 7, *supra*). Thus, the Conference Report stated that the Senate bill (which the conferees adopted in relevant part) "provides that an employer which violates the notice provisions of [29 U.S.C. 2102] is liable for back pay and a civil fine for 'each day of violation.'" H.R. Conf. Rep. No. 576, *supra*, at 1052.

[12] In discussing the back pay awards possible under the Act, Senator Hatch stated: "Take, for example, a company that has had to lay off 300 workers with only a month's notice instead of two. Assuming those workers had an average wage and benefit package amounting to $20 per hour, the total back pay award could equal $1,440,000." 134 Cong. Rec. 16,028 (1988). Senator Hatch's calculations assume that back pay under the Act would be awarded for eight hours for each calendar day of the violation (300 workers X 30 days/worker X 8 hours/day X $20/hour equals $1,440,000).

required by the Act, and the rejection of the Quayle amendment suggests that the Senate agreed with that view. The court of appeals therefore erred in concluding that the legislative history, taken as a whole, reflects a congressional determination that "back pay for each day of violation" should be limited to days on which an aggrieved employee would have worked if the violation had not occurred.

3. The question presented in this case warrants review by this Court. As the Fifth Circuit acknowledged, see Pet. App. A16, A20-A21, its decision conflicts directly with that of the Third Circuit in *United Steelworkers* v. *North Star Steel Co.*, 5 F.3d 39 (1993), cert. denied, 114 S. Ct. 1060 (1994), which held that, "under the plain language of the statute, a violating employer is liable for 'back pay' for each of the calendar days of the violation." *Id.* at 42. The district courts also disagree as to whether injured employees are entitled under the WARN Act to damages for each calendar day of the violation, or only for lost work days. Compare *Frymire* v. *Ampex Corp.*, 858 F. Supp. 1081, 1084 (D. Colo. 1994) (damages awardable for each calendar day); *Joshlin* v. *Gannett River States Publishing Corp.*, 840 F. Supp. 660, 663 (E.D. Ark. 1993) (same); *Wholesale & Retail Food Distribution Local 63* v. *Santa Fe Terminal Servs., Inc.*, 826 F. Supp. 326, 331 (C.D. Cal. 1993) (same, in dictum) and *United Electrical Workers* v. *Maxim, Inc.*, 5 IER Cas. (BNA) 629, 631-632 (D. Mass. May 15, 1990) (same) with *Washington* v. *Aircap Indus., Inc.*, 860 F. Supp. 307, 311-313 (D.S.C. 1994) (damages not awardable for non-work days) and *Jones* v. *Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1292, 1296 (same), amended in part, 753 F. Supp. 218 (E.D. Tenn. 1990).

However this conflict is resolved, the WARN Act should be uniformly interpreted and applied. The significant number of cases addressing this issue since the WARN Act's enactment attests to its importance, and the wide disagreement among the district courts suggests that the question will ultimately require resolution by this Court. Moreover, coupled with the Act's liberal venue provision, which permits a suit in "any district in which the violation is alleged to have occurred, or in which the employer transacts business," 29 U.S.C. 2104(a)(5), the current conflict is an invitation to widespread forum shopping.[13]

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[13] For instance, an employee who is terminated as the result of a plant shut-down in Louisiana, without the notice required by the WARN Act, could bring suit in the more favorable Third Circuit if the employer happens to "transact[] business" in Pennsylvania, while one whose employer's only business is within Louisiana could not.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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